

Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act

INTRODUCTION

GENERAL INFORMATION ABOUT INTELLECTUAL DISABILITIES

An estimated 2.5 million people in the United States have an intellectual disability—approximately 1% of the United States population.⁽³⁾ Estimates also indicate that only 31% of individuals with intellectual disabilities are employed, although many more want to work.⁽⁴⁾

An individual is considered to have an intellectual disability when: (1) the person's intellectual functioning level (IQ) is below 70-75; (2) the person has significant limitations in adaptive skill areas as expressed in conceptual, social, and practical adaptive skills; and (3) the disability originated before the age of 18.⁽⁵⁾ "Adaptive skill areas" refers to basic skills needed for everyday life. They include communication, self-care, home living, social skills, leisure, health and safety, self-direction, functional academics (reading, writing, basic math), and work.

Intellectual disabilities will vary in degree and effect from person to person, just as individual capabilities vary considerably among people who do not have an intellectual disability.⁽⁶⁾ People should not make generalizations about the needs of persons with intellectual disabilities. In some instances an intellectual disability will not be obvious from a person's appearance, nor will it be accompanied by a physical disability.

Persons who have intellectual disabilities may have other impairments as well. Examples of coexisting conditions may include: cerebral palsy, seizure disorders, vision impairment, hearing loss, and attention-deficit/hyperactivity disorder (ADHD). Persons with severe intellectual disabilities are more likely to have additional limitations than persons with milder intellectual disabilities.

Persons with intellectual disabilities successfully perform a wide range of jobs, and can be dependable workers. The types of jobs people with intellectual disabilities are able to perform will depend on individual strengths and interests. Examples include: animal caretakers, laundry workers, building maintenance workers, library assistants, data entry clerks, mail clerks, store clerks, messengers, cooks, printers, assemblers, factory workers, photocopy operators, grocery clerks, sales personnel, hospital attendants, housekeepers, statement clerks, automobile detail workers, and clerical aides.⁽⁷⁾

Yet, many employers still exclude persons with intellectual disabilities from the workplace because of persistent, but unfounded myths, fears, and stereotypes. For instance, some employers believe that workers with intellectual disabilities will have a higher absentee rate than employees without disabilities. Studies show that this is not true and that workers with intellectual disabilities are absent no more than other workers. Another popular misperception is that employing people with intellectual disabilities will cause insurance costs to skyrocket. Studies show, however, that employing workers with intellectual disabilities will not lead to higher insurance rates or more workers' compensation claims.⁽⁸⁾

1. When is someone with an intellectual impairment covered by the ADA?

Not everyone with an intellectual impairment is covered by the ADA. A person may meet the ADA's definition of "disability" in any one of three ways:

An individual's impairment must substantially limit one or more major life activities. Major life activities are activities that an average person can perform with little or no difficulty. Examples include walking, seeing, hearing, thinking, speaking, learning, concentrating, performing manual tasks, caring for oneself, and working.

Example: A person with an intellectual impairment is capable of living on his own, but requires frequent assistance from family, friends, and neighbors with cleaning his apartment, grocery shopping, getting to doctors' appointments, and cooking. He is unable to read at a level higher than the third grade, and so needs someone to read his mail and help him pay bills. This person is substantially limited in caring for himself and therefore has a disability under the ADA.

A person may have two or more impairments that are not substantially limiting by themselves, but that taken together substantially limit one or more major life activities. In that situation, the person has a disability.

Example: An employee has a mild intellectual disability and a mild form of ADHD. Neither impairment, by itself, would significantly restrict any major life activity. Together, however, the two impairments substantially limit the employee's ability to concentrate, learn, and work. The employee is a person with a disability.

Even if an impairment does not *currently* substantially limit a major life activity, if the person has a past record or history of a substantially limiting intellectual disability, the person is covered under the ADA.

Example: A person was erroneously diagnosed as having an intellectual disability that substantially limited his ability to learn when he was attending high school. The applicant has a past record or history of a disability.

The ADA also protects persons who do not have a substantially limiting intellectual disability, but are treated by an employer as if they do.

Example: An applicant with a facial deformity that affects her speech applies for a position as a secretary. The applicant is denied employment because the interviewer believes she has an intellectual disability and that the condition will make her unable to communicate with clients effectively. The employer has regarded the applicant as a person with a disability.

2. Can a person who has a family member with an intellectual disability be protected under the ADA?

In some instances, yes. The ADA's protections extend to people who do not have disabilities themselves but are discriminated against on the basis of their association with a person with a disability. The association may be with family members, friends, or any

other person. A person who experiences discrimination based on such an association has a right to protection under the ADA, but is not entitled to reasonable accommodation.⁽⁹⁾

Example: The parent of a child with an intellectual disability applies for a position as an attorney at a law firm and mentions during a discussion with one of her interviewers that she has a child with an intellectual disability. She is denied employment because the employer believes the child's disability will cause her to be absent from work and will affect her productivity. The parent is protected under the ADA.

OBTAINING AND USING MEDICAL INFORMATION

Title I of the ADA limits an employer's ability to ask questions related to disability and conduct medical examinations at three stages, including: pre-offer, post offer and during employment.

Job Applicants

Before an Offer of Employment is Made

The ADA limits the kinds of medical information that an employer can seek from a job applicant. An employer may not require a job applicant to take a medical examination or ask about a person's disability before making a job offer. However, the employer can ask an applicant questions about his/her ability to perform job-related functions, as long as the questions are not phrased in terms of a disability.

Example: An employer may not ask the following questions:

- whether or to what extent a person has an intellectual disability;
- whether the applicant has ever filed for workers' compensation;
- whether the applicant takes medication;
- whether the applicant has been hospitalized in an institution; or
- whether the applicant is receiving psychiatric treatment.

Example: An employer may ask the following questions if they relate to performance of the job:

- whether the applicant can lift a 45 pound load;
- whether the applicant can put files in alphabetical order; and
- whether the applicant can place items in numerical order.

If an applicant voluntarily tells an employer that s/he has an intellectual disability or if the disability is otherwise obvious, an employer may only ask questions regarding the need for a reasonable accommodation and/or what kind of accommodation may be needed.

Example: An applicant for a position as an office clerk voluntarily discloses to the employer that she has an intellectual disability and will need some type of work plan or technological device to remind her what her duties are. The employer may ask the applicant questions about reasonable accommodation, such as whether she prefers a detailed checklist or the use of a computer with touch screen (where verbal instructions and images guide her through the steps in a task). However,

the employer may not ask questions about medications, or about whether the employee will have problems with her attendance or job performance because of her intellectual disability.

At the pre-offer stage, an employer is also prohibited from asking a third party (such as a job coach, family member, or social worker attending an interview with an applicant who has an intellectual disability) any questions that it would not be permitted to ask the applicant directly.

After an Offer of Employment is Made

Once the employer has made a job offer, the employer may ask questions about the applicant's health (including questions about the applicant's disability) and may ask for or require a medical examination, as long as all applicants are treated the same, i.e. all applicants are asked the same questions and are required to take the same examination.

After an employer has obtained basic medical information from all individuals who have received job offers, it may ask specific individuals for more medical information if it is medically related to the previously obtained medical information. An employer must keep all obtained medical information confidential as discussed in Questions 4 and 5 below.

Employees

The ADA strictly limits the circumstances under which an employer may ask questions about an employee's medical condition or require the employee to undergo a medical examination. Generally, to ask an employee for medical information, an employer must have a reason to believe that there is a medical explanation for changes in the employee's job performance, or must believe that the employee's medical condition may pose a direct threat to safety. (See Question 4 for other instances when an employer may obtain medical information.)

3. May an employer routinely ask for medical information from an employee known to have an intellectual disability if the employee has performance problems?

No. Poor job performance may be unrelated to an intellectual disability and should generally be dealt with according to an employer's existing quality performance policy. Medical information can be sought only when an employer has a reasonable belief, based on objective evidence, that a medical condition may be the cause of the employee's performance problems.

Example: A bathroom attendant with an intellectual disability and Attention Deficit Disorder who has performed his job successfully for five years starts to show up to work late and appears anxious and emotional. The supervisor observed these changes soon after the employee moved into his brother's house. The supervisor can ask the employee why his performance has declined and may explore ways to improve his performance. However, the supervisor may not ask him questions about his intellectual disability unless there is objective evidence that his poor performance is related to his disability.

Keeping Medical Information Confidential

An employer must keep all medical information separate from general personnel files, and treat it as a separate, confidential medical record.

4. May an employer ever disclose the fact that someone has an intellectual disability?

Yes, in limited circumstances. The ADA's confidentiality requirements also include limited exceptions. An employer may disclose the fact that someone has an intellectual disability:

to supervisors and managers where necessary to provide a reasonable accommodation or to meet an employee's work restrictions;

Example: An employee in a fast food chain with an intellectual disability has worked under the same manager for two years. When the manager takes a job at another store, he leaves a detailed description for the new manager of the employee's job duties and her reasonable accommodations. This disclosure does not violate the ADA because the information is necessary for the employer to provide the employee the accommodations.

to first aid and safety personnel if an employee would need emergency treatment or require some other assistance in the event of an emergency;

Example: An employee with an intellectual disability works the assembly line of a manufacturing plant that bottles a highly flammable liquid. In the event of an emergency, the employee will need assistance to safely exit the premises. The employer tells the floor's designated safety captain that the employee has an intellectual disability and appoints the floor captain as the employee's emergency evacuation partner. This disclosure is permissible.

to individuals investigating compliance with the ADA and similar state and local laws; and
where required for workers' compensation or insurance purposes, for example, to process a claim.

5. May an employer tell employees who ask why a particular employee is receiving what seems like "special treatment" that the employee is receiving a reasonable accommodation?

No. Telling co-workers that an employee is receiving a reasonable accommodation amounts to a disclosure of the employee's disability. Rather than disclosing that the employee is receiving a reasonable accommodation, the employer should focus on the importance of maintaining employee privacy. Employers may be able to avoid many of these kinds of questions by giving all employees training on the requirements of EEO laws, including the ADA.

ACCOMMODATING PERSONS WITH INTELLECTUAL DISABILITIES

Under the ADA, employers must provide reasonable accommodations to the known physical or mental limitations of persons with disabilities. An accommodation is any modification or adjustment to a job or work environment that will permit a qualified applicant or employee with a disability to do the job, as well as enjoy equal benefits and privileges of employment. Once an employer determines that an individual has a disability that requires an accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. A third party may often request an accommodation on behalf of the person with an intellectual disability. If this happens, the employer must respond to the request as if the employee or applicant requested the accommodation.

Accommodations vary depending on the needs of the person with a disability. In some instances, the appropriate accommodation will be readily apparent. In others, the proper accommodation is not obvious. In those situations, the employer should have an informal and interactive discussion with the person and/or his representative to determine a suitable accommodation.

6. What types of reasonable accommodations do people with intellectual disabilities need for the application process?

Some persons with intellectual disabilities will need reasonable accommodations to apply and/or interview for a job. Such accommodations might include:

providing someone to read or interpret application materials for a person who has limited ability to read or to understand complex information;
demonstrating, rather than describing, to the applicant what the job requires;
modifying tests, training materials, and/or policy manuals; and
replacing a written test with an "expanded" interview.⁽¹⁰⁾ An expanded interview allows applicants who have difficulty describing their abilities to demonstrate their skills at the employment office or work site.

Example: A person with an intellectual disability applies for a position as a baker and is scheduled for an interview with the employer. The applicant also has a speech and hearing impairment. The employer can accommodate the applicant by conducting an expanded interview in which the applicant can demonstrate his ability to do the job.

7. What specific types of reasonable accommodations may employees with intellectual disabilities need to do their jobs or to enjoy the benefits and privileges of employment?

The following are accommodations that employees with intellectual disabilities may need:

Job restructuring (e.g., exchanging non-essential functions between employees)

Example: A crew of three employees works the concession stand of a baseball stadium. One of the employees has an intellectual disability. He helps stock the counter with candy and snacks; at closing time he cleans the counters and equipment and restocks the counters with supplies.

However, he cannot perform the marginal function of counting money at closing time. The marginal functions of another concession stand employee include placing empty boxes and trash in designated bins at closing time, which is something that the employee with an intellectual disability can perform. Switching the marginal functions performed by the two employees is a reasonable accommodation.

Training for the Job

The employer may:

- have the supervisor give instructions at a slower pace;
- give the employee additional time to finish the training;
- break job tasks into sequential steps required to perform the task;
- use charts, pictures, or colors;

Example: As part of his job, a restaurant worker with an intellectual disability refills condiment containers. The manager uses color coding so the employee can identify the specific condiment that goes in each container.

Example: A retail store employee with an intellectual disability and Attention Deficit Disorder loads customers' cars with purchased items. The store has a dress code that he often fails to follow. His supervisor gives him a sheet with photographs illustrating both proper attire and items of clothing prohibited by the store's employee dress code.

- provide a tape recorder to record directions as a reminder of steps in a task;
- use detailed schedules for completing tasks; and
- provide additional training if there are any on-the-job changes.

Example: A hotel cleaning crew worker with an intellectual disability and autism has not performed his cleaning duties to company quality standards. His supervisor offers him additional training and allows him to bring a third party to the training sessions to assist him in learning proper cleaning techniques.

Job Coach

A Job Coach can:

- assist the employee to reach job stabilization by helping her learn how to do the job. Once the employee learns her job duties, the Job Coach can gradually reduce the amount of time spent working with her;
- provide intensive monitoring, training, assessment and support to workers with intellectual disabilities;
- help develop a healthy working relationship between management and the employee by encouraging appropriate social interaction and maintaining open communications; and
- assist the parties in determining what reasonable accommodation is needed.

Modified Work Schedule

Example: A grocery stock worker with an intellectual disability is scheduled to attend group counseling sessions on Tuesdays, during working hours. Her employer has granted her request for a modified work schedule, allowing her to leave two hours early each Tuesday to attend the counseling sessions, and to make up for the time by beginning work two hours early on Tuesdays.

Help in Understanding Job Evaluations or Disciplinary Proceedings

- An employer may allow the employee to bring someone to a job evaluation or disciplinary meeting to help him ask questions and to explain the job evaluation results or the purpose of the meeting.

Acquisition or Modification of Equipment or Devices

Example: A receptionist with an intellectual disability and fetal alcohol syndrome has difficulty remembering the telephone numbers of office workers when transferring calls. As a reasonable accommodation, the employer purchased a large-button telephone with a speed dial and clearly labeled buttons with the names of office staff.

Work Station Placement:

Example: An employer relocates a data entry employee with an intellectual disability and Attention Deficit Disorder from a large open area where employees work side-by-side to a quieter part of the office to accommodate limitations on the employee's ability to concentrate.

8. How does a person with an intellectual disability request a reasonable accommodation?

The request for a reasonable accommodation must be communicated to the employer. However, no magic words (e.g., "reasonable accommodation" or "ADA") are needed. The request may be made in "plain English," orally or in writing, and it may come from a family member, friend, job coach or other representative.

Example: A person with an obvious intellectual disability wants to apply for a job in a large retail store. The store manager gives him the application forms. The applicant tells the manager that he needs someone to assist him with the application. This is a request for a reasonable accommodation.

Example: A video store clerk with an intellectual disability and Prader-Willi Syndrome⁽¹¹⁾ tells his supervisor that he needs to change his work schedule because the medication he takes every night makes it difficult for him to wake up very early in the morning. This is a request for a reasonable accommodation.

Example: The mother of a clerk with Down Syndrome calls the clerk's supervisor to tell him that she wants to schedule a meeting to discuss problems that her son is having with his job and some possible solutions. This is a request for a reasonable accommodation.

9. When should a person with an intellectual disability request a reasonable accommodation?

A person can ask for a reasonable accommodation at any time during the application process and any time the need develops during employment. An employee may also request a reasonable accommodation if there are new tasks on the job that make accommodations necessary. An employee with an intellectual disability may ask for a reasonable accommodation even if s/he did not ask for one when applying for a job or after receiving a job offer.

Example: A cleaning company crew member with an intellectual disability has been working the same floor of an office building for two years. For efficiency reasons, the cleaning company decides to start rotating staff to different floors every week. The crew member has difficulty adjusting to alterations to his daily routine. The employee's Job Coach contacts his supervisor and asks that he be allowed to work on one floor permanently, or that he work on one floor for two months, allowing him additional time to adjust to the change. This is a request for a reasonable accommodation.

10. Are there circumstances when an employer must ask whether a reasonable accommodation is needed when a person with an intellectual disability has not asked for one?

Yes. An employer has a legal obligation to initiate a discussion about the need for a reasonable accommodation and to provide an accommodation if one is available if the employer: (1) knows that the employee has a disability; (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.⁽¹²⁾

Example: A flower shop employee with an intellectual disability is in charge of stocking the containers in the refrigerators with flowers as they arrive from the suppliers. Each type of flower has a designated container and each container has a specific location in the refrigerator. However, the employee often misplaces the flowers and containers. The employer knows about the disability, suspects that the performance problem is a result of the disability, and knows that the employee is unable to ask for a reasonable accommodation because of his intellectual disability. The employer asks the employee about the misplaced items and asks if it would be helpful to label the containers and refrigerator shelves. When the employee replies that it would, the employer, as a reasonable accommodation, labels the containers and refrigerator shelves with the appropriate flower name or picture.

11. Does an employer have to grant every request for an accommodation?

An employer does not have to grant every request for an accommodation. The decision will depend on the individual situation and whether the request may cause "undue hardship." Undue hardship is an action requiring significant difficulty or expense when considered in light of an employer's size, financial resources, and the nature and structure of its operation.

In most cases, accommodating persons with intellectual disabilities is not expensive. Studies show that most workers with intellectual disabilities require no special accommodations and that the cost of accommodations is minimal.⁽¹³⁾ If an employer believes that a particular accommodation would result in undue hardship, however, it must consider an alternative accommodation.

An employer does not have to remove an essential job function (i.e., a fundamental job duty), lower production standards, excuse violations of conduct rules that are job-related and consistent with business necessity (see Question 17 below), or provide employees with personal use items, such as wheelchairs, eyeglasses, hearing aids, and other devices needed both on and off the job.

12. Does an employer have to provide the specific reasonable accommodation the person wants?

The employer may choose among different reasonable accommodations as long as the chosen accommodation is effective. Therefore, as part of the interactive process, the employer may offer more than one suggestion for a reasonable accommodation. Where two possible reasonable accommodations exist, and one costs more or is more burdensome than the other, the employer may choose the less expensive or less burdensome as long as it is effective. Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide. The preference of the person with a disability should be given primary consideration.

Example: A photocopy clerk with an intellectual disability has great difficulty reading the many work-related memoranda that her supervisor sends to the office staff. The employee has no difficulty understanding oral communication. The clerk asks her employer to tape record all the memoranda that are distributed. The supervisor asks whether having someone read and explain the memoranda would work instead, and the employee agrees that it would. Since both accommodations are effective, the supervisor may decide to have someone read and explain the memoranda to the employee.

13. May an employer ask for documentation when a person requests a reasonable accommodation?

When a person's disability is not obvious, the employer may ask the person to provide reasonable documentation about his/her disability. The employer is entitled to know that the person has a covered disability for which a reasonable accommodation is needed. The employer may not request documentation unrelated to the disability at issue, or the accommodation requested. If a person has more than one disability, an employer may *only* ask for information related to the disability that requires accommodation. The employer may request that information or documentation of a person's impairment be provided by a physician or an appropriate professional. Information about a person's functional limitations can also be obtained from non-professionals, such as the applicant, his/her family members, and friends.

Example: A marketing office clerk has a mild intellectual disability and Attention Deficit Disorder which, when combined, create a substantial limitation on his ability to concentrate. The clerk meets with his supervisor every morning to discuss his tasks for the day. In order to remember his assigned tasks, the clerk needs his instructions in writing, but due to his disability, he has difficulty writing clearly. The clerk tells his supervisor about his disability and requests a personal digital assistant (PDA) where his supervisor can record and he can retrieve, step-by-step audio and video instructions regarding his tasks. Because neither the disability nor the need for accommodation are obvious to his supervisor, his supervisor may ask him for reasonable documentation about his impairment; for instance, the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment

limits his ability to perform the activity or activities. The supervisor also may ask why the disability requires the use of a PDA.

14. May an employer be required to provide more than one reasonable accommodation for the same person with a disability?

Yes. Certain individuals require only one reasonable accommodation, while others may need more than one. Additionally, because the obligation to provide reasonable accommodation is ongoing, an employer may have to provide a different reasonable accommodation when an employee's disability-related needs or the nature of a job change.

15. Do persons with intellectual disabilities need more supervision than other employees?

The type and amount of supervision required for employees with intellectual disabilities will depend on the type of work and the person's individual strengths. It may take persons with intellectual disabilities longer to master the tasks associated with a job. However, studies have established that when workers with intellectual disabilities are properly trained, they can perform as effectively as workers without intellectual disabilities in the same job.⁽¹⁴⁾ In other situations, modifying supervisory methods may be an appropriate form of reasonable accommodation. Some employees with intellectual disabilities may benefit from additional day-to-day guidance or feedback, or from having a large task broken down into smaller parts that are easier to understand.

SAFETY CONCERNS

It is a common misperception that persons with intellectual disabilities are more susceptible to accidents in the workplace and present an increased safety risk. A number of surveys indicate that employees with intellectual disabilities do not create an increased safety risk in the workplace and that their safety records are equivalent to those of employees without disabilities.⁽¹⁵⁾ An employer may refuse to hire a person because of her disability only if she in fact poses a "direct threat" to her own health or safety, or to the health and safety of others in the workplace. The term "direct threat" means "significant risk to the health or safety of the individual with a disability or others that cannot be eliminated by reasonable accommodation."⁽¹⁶⁾

16. How does an employer determine if a person poses a direct threat?

The employer must evaluate the person's ability to safely perform the essential functions of the job. Factors the employer must consider are the duration of the risk, nature and severity of the potential harm, the likelihood that it will occur, and the imminence of the potential harm. The effect of any reasonable accommodation that would reduce or eliminate the risk of harm must also be considered. The employer's assessment of direct threat must not be based on fears, myths or stereotypes, but on credible and objective evidence.

Example: An employer cannot deny an applicant with an intellectual disability a job preparing food in a restaurant kitchen based on the assumption that people with intellectual disabilities are incapable of using sharp knives or working around hot ovens without injuring themselves. To assess whether the applicant would actually pose a direct threat, the employer must consider information from a medical professional and the applicant himself concerning the limitations imposed

by the disability. The employer should also consider any training or prior work experience the applicant may have had, and whether he has had safety problems performing tasks similar to those required for the current position.

Example: An employer may deny a factory job requiring work around dangerous machinery to someone whose intellectual disability makes it impossible for her to understand and follow safety procedures.

CONDUCT

As with any employees, circumstances may arise when employers must determine whether to discipline employees with intellectual disabilities for misconduct.

17. May an employer discipline a person with an intellectual disability for violating a conduct rule?

An employer does not have to excuse violations of a uniformly applied conduct rule that is job-related and consistent with business necessity. An employer may discipline an employee with a disability for engaging in misconduct, as long as the employer imposes the same discipline on an employee without a disability. This means, for instance, that an employer does not have to tolerate or excuse violence, threats of violence, stealing, or destruction of property.

Example: An employee with an intellectual disability works in a retail store stocking shelves. The employee engages in sudden and unprovoked violent behavior by striking other employees. The employer has a "zero-tolerance" policy that results in the termination of any employee who strikes a co-worker, and the employer applies this policy consistently. The employer may discipline the employee in accordance with this policy.

Example: A person with an intellectual disability works in the warehouse of a hospital complex opening boxes and placing newly received merchandise in the appropriate shelf area. He has no contact with hospital patients and has limited contact with other employees. Warehouse co-workers have complained that he often uses curse words in the work area. Although the employer has a workplace conduct rule that prohibits all employees from cursing and enforces this rule with workers who have frequent contact with the public, other warehouse employees violate the rule and are never disciplined. In this case, the conduct rule is not job-related and consistent with business necessity because the employee has no contact with hospital patients and does not come into frequent contact with other employees. Also, the conduct rule is not enforced uniformly among all employees. Thus, applying the conduct rule relating to cursing to this employee would violate the ADA.

HARASSMENT

The ADA prohibits harassment based on disability just as other federal laws prohibit harassment based on race, sex, color, gender, national origin, religion or age. Approximately 20% of the employment discrimination claims brought by persons with intellectual disabilities under the ADA allege harassment based on disability.⁽¹⁷⁾ The EEOC has litigated a number of these cases.⁽¹⁸⁾

18. What constitutes actionable harassment under the ADA?

The ADA prohibits offensive conduct that is sufficiently severe or pervasive to create a hostile or abusive work environment. Acts of harassment may include verbal abuse, such as name-calling, behavior such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. The law does not protect workers with disabilities (or any workers) from merely rude or uncivil conduct. To be actionable, conduct related to an employee's intellectual disability must be sufficiently severe or pervasive as to be both subjectively hostile and abusive (to the person) and to a reasonable person.

Example: A fast food restaurant worker with an intellectual disability is often yelled at by the restaurant's assistant manager. The assistant manager calls her derogatory names that specifically relate to her disability. Specifically, the assistant manager constantly refers to her Job Coach as her "nanny" and yells in front of her co-workers, "Hey, where's your nanny, you stupid baby?" The assistant manager also treats her in a disparaging manner, for example, by making her eat her lunch away from everybody else in the break room. The manager's statements and behavior are actionable disability-based harassment.

19. What are the employer's responsibilities in the event of harassment based on a person's disability?

An employer is responsible for maintaining a workplace that is free of harassment based on disability. Failure by an employer to take appropriate steps to prevent or correct harassment may contribute to employer liability for unlawful harassment. Generally, an employer will be liable for unlawful harassment by a supervisor unless it can show the following: (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.⁽¹⁹⁾

An employer is liable for unlawful harassment by coworkers or non-employees if the employer knew or should have known about the harassment and failed to take immediate and appropriate corrective action.⁽²⁰⁾

Example: A janitor with an intellectual disability and a hearing impairment is teased and undermined by his co-workers. They move their fingers at him as though they were using sign language, pretend they are talking to him by making mouth movements just to confuse him, call him "deaf and dumb," and do not write notes to him about important things he needs to know. The employee has complained to his supervisor, but his supervisor has failed to take any action. The employer is liable for harassment based on disability.

Eliminating disability-based harassment in the workplace must begin with prevention. An employer may take the following steps to prevent and correct harassment:

- disseminate and clearly explain policy statements prohibiting discrimination based on disability in a way that ensures that all employees will understand them;
- provide training for management and employees;
- establish grievance procedures to address disability harassment;
- respond immediately to disability harassment by investigating incidents thoroughly and promptly, taking prompt and effective action to end the harassment and prevent it from recurring, and remedying the effects on the employee who was harassed.

20. What are the employee's responsibilities in the event of harassment based on disability?

Employees who believe they have been subjected to harassment because of their intellectual disability should not ignore the harassment and should take appropriate steps at an early stage to prevent further harassment. An employee may take the following steps if he or she has been subjected to harassment:

- keep a journal with detailed information on instances of harassment, including times, places and the names of people who might have seen the harassment occur;
- discuss the situation with a family member, friend, Job Coach, or social worker for support and guidance;
- tell the person who engaged in harassment that his or her actions are not welcome;
- let supervisors or other management officials know about the harassment;
- contact the person responsible for handling harassment complaints;
- notify the next higher official in the employer's chain of command in the event that the employee's direct supervisor is the alleged harasser.

LEGAL ENFORCEMENT

Any person who believes that his or her employment rights have been violated on the basis of disability and wants to make a claim against an employer must file a charge of discrimination with the EEOC. A third party may also file a charge on behalf of another person claiming to be aggrieved. For example, a family member, social worker, or other representative can file a charge on behalf of someone with an intellectual disability. The charge must be filed by mail or in person with the local EEOC office within 180 days from the date of the alleged violation. The 180-day filing deadline is extended to 300 days if the charge is also covered by a state or local anti-discrimination law.

The EEOC will send the parties a copy of the charge and may ask for responses and supporting information. Before formal investigation, the EEOC may select the charge for EEOC's mediation program. Both parties have to agree to mediation, which may prevent a time consuming investigation of the charge. Participation in mediation is free, voluntary and confidential.

If mediation is unsuccessful, the EEOC investigates the charge to determine if there is "reasonable cause" to believe discrimination has occurred. If reasonable cause is found, the EEOC will then try to resolve the charge with the employer. In some cases, where the charge cannot be resolved, the EEOC will file a court action. If the EEOC finds no discrimination, or if an attempt to resolve the charge fails and the EEOC decides not to file suit, it will issue a notice of a "right to sue," which gives the charging party 90 days to file a court action. A charging party can also request a notice of a "right to sue" from the EEOC 180 days after the charge was first filed with the Commission, and may then bring suit within 90 days after receiving the notice. For a detailed description of the process, you can visit our website at http://www.eeoc.gov/charge/overview_charge_filing.html.

For issues relating to federal employment, please refer to our website at <http://www.eeoc.gov/facts/fs-fed.html>.

Retaliation

The ADA prohibits retaliation by an employer against someone who opposes discriminatory employment practices, files a charge of employment discrimination, or testifies or participates in any way in an investigation, proceeding or litigation. Persons who believe that they have been retaliated against may file a charge of retaliation with the EEOC as described above.

1. See Questions and Answers About Diabetes in the Workplace and the Americans with Disabilities Act (ADA) at www.eeoc.gov/facts/diabetes.html and Questions and Answers About Epilepsy in the Workplace and the Americans with Disabilities Act (ADA) at www.eeoc.gov/facts/epilepsy.html.

2. The EEOC's use of the term "intellectual disabilities" follows the model of the President's Committee on Intellectual Disabilities (formerly known as the President's Committee on Mental Retardation). The Committee adopted this term to "update and improve the image of people with disabilities who were formerly referred to as people with mental retardation and to help reduce discrimination against these citizens." The Committee also "sought to reduce the public's confusion between the terms mental illness and mental retardation and to remove the use of terms which resulted in faulty name-calling." President's Committee for People with Intellectual Disabilities. www.acf.hhs.gov/programs/pcpid/index.html.

3. See Peter David Blanck, The Americans with Disabilities Act and the Emerging Workforce: Employment of People with Mental Retardation, American Association on Mental Retardation (1998) at 17, citing Ability: The Bridge to the Future, President's Committee on Employment of Persons with Disabilities, Educational Kit (July 1997).

4. See Sheryl Larson, Charlie Lakin, Nohoon Kwak & Lynda Anderson, Functional Limitations of Adults in the U.S. Non-Institutionalized Population: NHIS-D Analysis, MR/DD Data Brief, Research and Training Center on Community Living, Institute on Community Integration, University of Minnesota, October 2001, Vol.3, No. 3, at 11.

5. According to the American Association on Mental Retardation (AAMR), the following five assumptions are essential to the application of this definition:

(1) Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.

(2) Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor and behavioral factors.

(3) Within an individual, limitations often coexist with strengths.

(4) An important purpose of describing limitations is to develop a profile of needed supports.

(5) With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve.

www.aamr.org/Policies/faq_mental_retardation.shtml

6. www.thearc.org/faqs/mrqa.html

7. www.thearc.org/faqs/emqa.html

8. See Blanck, *supra* note 3, at 131. See also, Equal to the Task II: 1990 Du Pont Survey of Employment of People with Disabilities.

9. A reasonable accommodation is any work-related modification that will permit an employee or prospective employee with a disability to participate in the job application process, to perform the essential functions of a job or to partake of the same benefits and privileges of employment as are enjoyed by employees without disabilities. (See Questions 6-15 for more information on reasonable accommodation.)

10. Institute for the Study of Exceptional Children and Youth at the University of Maryland at College Park. The Untapped Resource: The Employee with Mental Retardation (n.d.).

11. Prater-Willi Syndrome is a genetic disorder that typically causes obesity, developmental delays, behavioral issues and delayed sexual development. See Prater-Willi Syndrome Association at www.pwsausa.org.

12. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act at 54-56. This enforcement guidance is available at www.eeoc.gov/policy/docs/accommodation.html.

13. See Blanck, *supra* note 3, at 42-43. See also, Job Accommodation Network at www.jan.wvu.edu.

14. www.thearc.org/faqs/emqa.html

15. See Blanck, *supra* n. 3 at 131. See also, Equal to the Task II: 1990 Du Pont Survey of Employment of People with Disabilities.

16. 29 C.F.R. § 1630.2(r).

17. See Blanck, *supra* note 3, at 56 and 61.

18. See EEOC v. Luby's, Inc., No. CV-04-1094PHX (DGC) (D. Ariz. May 27, 2004) (claiming that the charging party was subjected to harassment based on her intellectual disability when other employees physically threatened her, she was denied her reasonable accommodations and she was retaliated against); EEOC v. Renaissance Roofing, Inc., No. 02-C-50370 (N.D. Ill. Sept. 27, 2002) (company charged with discriminating against an employee with a mild intellectual disability by subjecting him to harassment and discharge because of his disability); EEOC v. Spylen of Denville, Inc., d/b/a Wendy's, No. 02-4091 (WHW) (D.N.J. March 16, 2004) (alleging that defendant subjected charging party to a hostile work environment because of his disability, Down Syndrome, causing charging party's constructive discharge. The case was resolved through a consent decree.); EEOC v. GMRI, Inc., d/b/a Olive Garden, No. C-01-44-M (D.N.H. Feb. 7, 2001) (alleging that defendant, a nationwide restaurant chain, subjected the charging party, a dishwasher, to daily physical and verbal abuse because of his intellectual disability. The case was resolved through a consent decree).

19. The standard for employer liability for harassment by supervisors was established by the Supreme Court in two decisions addressing sexual harassment: *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

20. In these cases, the employer's liability for harassment by non-employees may be affected by the degree of control the employer exercises over the alleged harasser. See 29 C.F.R. § 1606.8(e).